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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 GS HOLISTIC, LLC,

14 Plaintiff,

15 v.

16 CAIRO FUSION INC d/b/a FUSION
17 SMOKE SHOP and MOHAMED
18 BADAWEY,

19 Defendants.

No. 3:23-cv-00751-LB

RESPONSE TO COURT ORDER
REGARDING SERVICE [ECF 50] AND
MOTION FOR LEAVE TO FILE SECOND
AMENDED COMPLAINT

20 The Plaintiff, GS HOLISTIC, LLC, by and through its undersigned counsel, hereby files
21 its Response to the Court's Order Regarding Service dated July 21, 2024, [ECF 50], and in support
22 thereof states as follows:
23

24 1. On February 19, 2023, the Plaintiff filed its Complaint for Trademark Infringement
25 and False Designation of Origin and Unfair Competition FUSION SMOKE SHOP d/b/a FUSION
26 SMOKE SHOP and JOHN DOE [ECF 1].

27 2. On June 26, 2023, after investigating the owner of the fictitious business name,
28 FUSION SMOKE SHOP, the Plaintiff filed an Amended Complaint against CAIRO FUSION INC
d/b/a FUSION SMOKE SHOP and MOHAMED BADAWEY, substituting the defendants [ECF
14].

1 3. On May 14, 2024, the Plaintiff filed its Motion for Default Judgment against the
2 Defendants, CAIRO FUSION INC d/b/a FUSION SMOKE SHOP and MOHAMED BADAWEY
3 [ECF 44], referencing the proofs of service against the Defendants ECF Nos.21 and 33.

4 4. On July 21, 2024, the Court entered an Order Regarding Service and requested an
5 update from the Plaintiff that addresses the issues mentioned in the Order.
6

7 5. In order to respond to the Court's Order and to explain how the addresses the
8 defendants were served are tied to the defendants, the Plaintiff conducted a further investigation
9 and ran a Comprehensive Report on the Defendants.

10 6. The Plaintiff's investigation revealed that CAIRO FUSION INC and MOHAMED
11 BADAWEY were not the correct defendants as they were previous owners of the business store
12 named FUSION SMOKE SHOP.
13

14 7. The Plaintiff discovered that the current owner of the business store and the correct
15 defendant is KRISHNA DAHAL d/b/a FUSION SMOKE SHOP, as explained below.

16 8. As alleged in the Amended Complaint [ECF 14], the Plaintiff's investigator
17 purchased the infringing product from a retail store named FUSION SMOKE SHOP, located at
18 2026 Alum Rock Avenue, San Jose, CA 95116. The date of the purchase was October 14, 2022.

19 9. According to the information on the City of San Jose Business Tax Lookup
20 Database, the previous owners of the business store were CAIRO FUSION INC and MOHAMED
21 BADAWEY. However, there was a change of owner, and as of January 25, 2022, the owner of
22 FUSION SMOKE SHOP was KRISHNA DAHAL.
23

24 10. The Plaintiff also conducted a business report on FUSION SMOKE SHOP, and the
25 report confirmed that MOHAMED BADAWEY was the previous contact for the business.
26 Additionally, the Report listed KRISHNA DAHAL as the owner of the property located at 2026
27 Alum Rock Avenue, San Jose, CA 95116.
28

1 11. The following search in the CDTFA database confirmed that FUSION SMOKE
2 SHOP is a sole proprietorship, rather than a corporation.

3 12. For the following reasons, the Plaintiff now withdraws its Motion for Default
4 Judgment [ECF 44], and requests that the clerk's default against the Defendants, CAIRO FUSION
5 INC d/b/a FUSION SMOKE SHOP and MOHAMED BADAWY, be set aside as they are not the
6 correct defendants. The Plaintiff further requests permission to file a Second Amended Complaint
7 to substitute the Defendants for the correct Defendant, KRISHNA DAHAL d/b/a FUSION
8 SMOKE SHOP.
9

10 13. The proposed Second Amended Complaint and associated two Exhibits are
11 attached hereto and marked as Exhibit "A-C".
12

13 14. The Plaintiff's Second Amended Complaint substitutes CAIRO FUSION INC
14 d/b/a FUSION SMOKE SHOP and MOHAMED BADAWY for KRISHNA DAHAL d/b/a
15 FUSION SMOKE SHOP, who is the actual owner of the store in this Complaint. The Second
16 Amended Complaint also includes more detailed and specific factual allegations.

17 15. Federal Rule of Civil Procedure 15(a) contemplates that a court will freely grant
18 leave to file an amended complaint when the interests of justice so require. *See generally*
19 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003); *Owens v. Kaiser Found.*
20 *Health Plan, Inc.*, 244 F.3d 708 (9th Cir. 2001); *Foman v. Davis*, 371 U.S. 178 (1962). This
21 standard is readily met here as justice so requires the substitution of a wrongly named defendants
22 for the correct alleged infringer so that the Plaintiff can determine the fault of the actual alleged
23 infringers. Additionally, substitution of the Defendants is in the best interest of judicial economy
24 and will avoid the need for the Plaintiff to refile its Complaint.
25

26 16. The U.S. Supreme Court determined that "[i]n the absence of...undue delay, bad
27 faith or dilatory motive...undue prejudice...futility of amendment, etc.—the leave sought
28

1 should...be ‘freely’ given.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). The Plaintiff is seeking
2 to amend the Complaint to correct the named Defendants. There is no bad faith in the Plaintiff’s
3 request. Further, there is no undue delay as the case is still early in the litigation and the Plaintiff
4 only recently discovered the information of the store owner.

5
6 17. Therefore, allowing the Plaintiff to file the Second Amended Complaint at this time
7 will allow the case to move forward with all alleged infringers and preserve this Court’s time and
8 resources.

9
10 18. As such, this Court should allow the Plaintiff to file its Second Amended
11 Complaint, attached to this Motion, as a separate docket entry.

12 WHEREFORE, the Plaintiff, GS HOLISTIC, LLC, respectfully requests that this Court
13 grant this motion, set aside the entry of clerk’s default against Defendants CAIRO FUSION INC
14 d/b/a FUSION SMOKE SHOP and MOHAMED BADAWY, and enter an Order granting the
15 Plaintiff to file a Second Amended Complaint to substitute the defendant.

